

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2012-212669

Joe Perry and Osteen Publishing Co., Inc. ....Appellants

v.

Harvin Bullock, in his capacity as  
Sumter County  
Coroner.....

Respondent

RECORD ON APPEAL

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**SC Court of Appeals**

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RECORDED

STATE OF SOUTH CAROLINA )  
2012 JUL -9 PM 2:45 IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER )  
JAMES D. CAMPBELL )  
CLERK OF COURT )  
SUMTER COUNTY, S.C. )

Joe Perry and Osteen Publishing Co., Inc., )

Civil Action No. 2011-CP-43-0979

Plaintiffs, )

v. )

**ORDER**

CERTIFIED TRUE COPY  
OF ORIGINAL FILED

Harvin Bullock, in his capacity as )  
Sumter County Coroner, )

*James D. Campbell*  
DEPUTY CLERK OF COURT  
SUMTER COUNTY  
SOUTH CAROLINA

Defendant. )  
\_\_\_\_\_ )

This matter is before this Court on the cross motions for summary judgment filed by the parties. A hearing was held on April 2, 2012. Counsel for both parties were in attendance. After a review of the pleadings, the written submissions by the parties, and the oral arguments of counsel, this Court grants the Defendant Harvin Bullock's motion for summary judgment, denies the Plaintiffs' motion for summary judgment, and dismisses this action with prejudice.

**I. Factual and Procedural Background**

This is an action seeking declaratory and injunctive relief pursuant to the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10, *et seq.* On or about December 16, 2010, the Plaintiff Joe Perry in his capacity as an employee of "The Item" sent a letter to the Defendant Harvin Bullock, the Sumter County Coroner, making a FOIA request for records related to the autopsy of Aaron Leon Jacobs. By letter dated January 7, 2011, the Sumter County Attorney on behalf the Coroner responded to the FOIA request and declined to produce a copy of the autopsy

report in his possession. The Coroner took the position that the records related to the autopsy of Aaron Leon Jacobs are not subject to disclosure because they constitute medical records under S.C. Code Ann. § 30-4-20(c) and are otherwise exempt as investigative reports under S.C. Code Ann. § 30-4-40(a)(3). The Plaintiffs thereafter filed this action on May 23, 2011, challenging the Coroner's FOIA decision.

## II. Legal Analysis

The principal issue before this Court asks whether the autopsy report for Aaron Leon Jacobs as prepared by Janice C. Ross, M.D. qualifies as a "medical record" as that term is used in the definition of "public record" set forth in Section 30-4-20(c) of the Freedom of Information Act (FOIA). Section 30-4-20(c) provides as follows:

- (c) "Public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. Records such as income tax returns, *medical records*, hospital medical staff reports, scholastic records, adoption records, records related to registration, and circulation of library materials which contain names or other personally identifying details regarding the users of public, private, school, college, technical college, university, and state institutional libraries and library systems, supported in whole or in part by public funds or expending public funds, or records which reveal the identity of the library patron checking out or requesting an item from the library or using other library services, except nonidentifying administrative and statistical reports of registration and circulation, and other records which by law are required to be closed to the public *are not considered to be made open to the public under the provisions of this act.*

S.C. Code Ann. § 30-4-20(c). (Emphasis added). The term "medical record" is not defined by the statute and therefore must be given its plain and ordinary meaning.

At the April 2, 2012 motion hearing, the Court reviewed *in camera* a copy of the autopsy report at issue as well as the Coroner's file. The Court finds that the autopsy report is a medical record by the plain and ordinary meaning of the term. The autopsy report is prepared by a medical doctor and sets forth medical information on the deceased including medical history and the medical findings of a medical doctor. The Coroner presented the affidavit testimony of the pathologist who prepared the autopsy report at issue. Dr. Janice Ross offers her professional opinion that the autopsy report is a medical record. *See*, Ross Affidavit, paras. 6-7. Dr. Ross explains that "[a]n autopsy report includes highly personal medical information and medical history of the deceased as well as information on the cause of death." *See*, Ross Affidavit, para. 6. The Plaintiffs contend that Dr. Ross's opinions should be discounted because the meaning of "medical record" is an issue of law. Yet, regardless of whether an issue of law or fact or a mixed question, the Court must determine the plain and ordinary meaning of the term "medical record" and determine specifically whether an autopsy report is a "medical record." The Court ultimately agrees with Dr. Ross that an autopsy report is a "medical record."

The disclosure of an autopsy report under FOIA has not been directly addressed by our appellate courts. However, in the case of *The Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984), the Circuit Court did rule that a medical examiner's records are not subject to disclosure under FOIA as "medical records" per S.C. Code Ann. § 30-4-20(c). While that issue was not directly before the Supreme Court because the Circuit Court's ruling on that point was not appealed, that aspect of the *Sexton* decision has never been questioned by the Supreme Court or other courts.

Instead of focusing on the meaning of "medical record" in Section 30-4-20(c), the Plaintiffs rely entirely on Section 30-4-40(a)(18), which is part of the FOIA exemption section.

Section 30-4-40(a)(18) currently reads as follows:

A public body may but is not required to exempt from disclosure the following information:

(18) Photographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy, except that the photographs, videos, images, or recordings may be viewed and used by the persons identified in Section 17-5-535 for the purposes contemplated or provided for in that section.

S.C. Code Ann. § 30-4-40(a)(18).

By way of legislative background, Section 30-4-40(a)(18) was initially enacted by the General Assembly in 2002 as part of the so-called "Dale Earnhardt Law" which was precipitated by the media's efforts to obtain autopsy photographs of the deceased NASCAR driver in Florida after his death in the 2001 Daytona 500. In 2002 Act No. 350, the South Carolina General Assembly enacted Section 30-4-40(a)(18) as well as Section 17-5-735. As originally enacted, the language of Section 30-4-40(a)(18) was identical to that of Section 17-5-735. The following year, in 2003, the General Assembly adopted the current language in Section 30-4-40(a)(18) in addition to expanding the permissible uses of autopsy photographs, videos, and audio recordings in Section 17-5-735. The title to 2003 Act No. 34 is as follows:

An Act to amend Section 17-5-535, Code of Laws of South Carolina, 1976, relating to persons authorized to view photographs or videos of and incidental to the performance of an autopsy and the penalty for violating this provision, so as to provide additional circumstances in which photographs, visual images, videos, and audio recordings of or related to an autopsy may be viewed, or disseminated and to amend Section 30-4-40, as amended, relating to matters that are exempt from disclosure under the Freedom of Information Act, *so as to revise circumstances in which photographs and videos of and related to the performance of an*

*autopsy may be viewed, and to provide the circumstances in which certain visual images and audio recordings of an autopsy may be viewed and used.*

2003 Act No. 34. (Emphasis added).

Of significance, the General Assembly makes no mention of changing the law regarding the disclosure of written autopsy reports. It is also well settled that "there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing the legislation when later statutes are enacted concerning related subjects." *Whitner v. State of South Carolina*, 328 S.C. 1, 492 S.E.2d 777, 779 (1997). *See also, Russo v. Nationwide Mut. Ins. Co.*, 334 S.C. 455, 513 S.E.2d 127 (Ct. App. 1999). Thus, the General Assembly is presumed to have had knowledge of the *Sexton* case which found that an autopsy report is not subject to disclosure under FOIA because it is a "medical record."

The Plaintiffs, nonetheless, rely on the statutory rule of *expressio unius est exclusio alterius* to suggest that the General Assembly's exemption of autopsy photographs, videos, and audio recordings in Section 30-4-40(a)(18) implies that the written autopsy report is subject to disclosure. The Plaintiffs' reasoning is flawed.

In Section 30-4-40(a)(18), the General Assembly used the words "of or related to the performance of an autopsy." The General Assembly did not use the words "which are part of an autopsy report." The difference is significant because an autopsy is a procedure while an autopsy report is a writing, a medical record, in fact, that describes the findings and conclusions of the medical doctor who performed the procedure.

The definition of "public record" set forth in Section 30-4-20(c) generally includes "photographs, tapes, ... recordings" and does not specifically exclude medical photographs or recordings. With the enactment of the "Dale Earnhardt Law," the General Assembly clearly

intended to expand existing restrictions on access to autopsy information. The General Assembly did not need to exempt written autopsy reports because it was already accepted that written autopsy reports are not "public records." However, because photographs, videos, and recordings are arguably not "medical records," the General Assembly enacted Section 30-4-30(18).

In effect, Section 30-4-40(a)(18) was not added to FOIA to make parts of a written autopsy report subject to disclosure. If that were the intent of the General Assembly, it would have certainly made that change in the law clear. Instead, this Court finds that Section 30-4-40(a)(18) was enacted because the General Assembly wanted to protect against the release of certain graphic audio and visual recordings and it did so by exempting those graphic audio and visual recordings from release in FOIA and by criminalizing the release of those graphic audio and visual recordings except in accordance with Section 17-5-535.

In sum, if the photographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy were necessarily a part of the autopsy report, it would not have needed separate mention in FOIA because an autopsy report is not a public record and, consequently, is not subject to disclosure under FOIA. However, given the possibility that photographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy would not necessarily be considered part of an autopsy report, the General Assembly described them in the terms "of and related to the performance of an autopsy" and exempted them from disclosure under FOIA.

Finally, the Court remains unconvinced by the Plaintiffs' statutory construction argument based on Section 30-4-30(18) because that section is inherently inconsistent with the intent of the Dale Earnhardt Law. It is clear from 2002 Act No. 350 and 2003 Act No. 34 that the General

Assembly intended with the Dale Earnhardt Law to *prohibit* access to autopsy photographs, videos and recordings except to certain specified persons and did not intend to permit any discretion to be exercised by the holder of those items. Section 17-5-735, which criminalizes any disclosure to non-authorized persons, makes that clear. Yet, inexplicably and inconsistent with Section 17-5-735, the General Assembly added the prohibition from Section 17-5-735 to Section 30-4-30, which by its express language says that the exemption is not a prohibition. Section 30-4-30 creates discretion in the public body by stating that "a public body may but is not required to exempt ...." S.C. Code Ann. § 30-4-40(a). That is clearly contrary to Section 17-5-735, which provides for no discretion and indeed criminalizes an unauthorized disclosure. In actuality, the prohibition on release of autopsy photographs, videos and audio recordings should have been added to the definition of "public record" as set forth in Section 30-4-20(c). Hence, given the clear legislative history, the Court declines to look to the "exemption" in Section 30-4-30(18) as establishing whether or not a written autopsy report was intended to be subject to disclosure under FOIA.

Instead, after giving full consideration to the arguments of both sides, the Court agrees with the ruling in *Sexton* and concludes as a matter of law that the written autopsy report for Aaron Leon Jacobs is a "medical record" as that term is used in the definition of "public record" set forth in Section 30-4-20(c), and therefore, this Court rules that the autopsy report at issue is not subject to disclosure under FOIA.<sup>1</sup>

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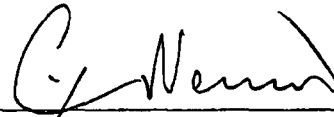
<sup>1</sup> The Coroner has also argued that the Plaintiffs' request for the autopsy report for Aaron Leon Jacobs is moot because the Plaintiffs currently have possession of the autopsy report from another source. The Court does not find it necessary to reach this issue.

**III. Conclusion**

IT IS, THEREFORE, ORDERED that the Defendant's motion for summary judgment is hereby GRANTED and the Plaintiffs' Complaint is dismissed with prejudice.

IT IS FURTHER ORDERED that the Plaintiffs' motion for summary judgment is DENIED.

AND IT IS SO ORDERED.



---

CLIFTON NEWMAN  
Presiding Circuit Court Judge  
Third Judicial Circuit

July 9, 2012

Sumter, South Carolina

STATE OF SOUTH CAROLINA )  
COUNTY OF SUMTER )

IN THE COURT OF COMMON PLEAS

JOHN CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

Joe Perry and Osteen Publishing Co., Inc., )  
Plaintiffs, )

v. )

Harvin Bullock, in his capacity as )  
Sumter County Coroner, )

Defendant. )

COMPLAINT  
(Non-Jury)  
Freedom of Information Act  
Action for Declaratory Judgment  
and Injunctive Relief

Plaintiffs, complaining of Defendant alleges:

1. Joe Perry (Perry) is a citizen of South Carolina residing in Sumter County.
2. Osteen Publishing Co., Inc., is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Sumter County where it publishes The Item newspaper.
3. Defendant, Harvin Bullock, is the coroner for Sumter County and in that capacity is a "public body" under the South Carolina Freedom of Information Act (FOIA),
4. Heretofore, on or about December 16, 2010, Perry, on behalf of The Item wrote to defendant to request access to public records relating to the autopsy of Aaron Leon Jacobs. A copy of the request is attached hereto as Exhibit A and incorporated herein by reference.
5. Defendant told Perry that he would not release the autopsy report on grounds that it was a medical record, the release of which was precluded by the Federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), and that the autopsy report was a medical record.

6. On or about January 7, 2011, the Sumter County attorney responded in writing to plaintiffs' request denying the requests on grounds that the records were "medical records" and the report was "an investigative report, the release of which would be premature...." A copy of the Sumter County attorney letter denying plaintiffs' request is attached hereto as Exhibit B and incorporated herein by reference.

7. Plaintiffs are informed and believe that the records requested are "public records" under the FOIA.

8. Plaintiffs are informed and believe that defendant's denial of an opportunity to inspect and copy the requested public records is a violation of the FOIA.

9. Plaintiffs are informed and believe that even in those instances where portions of public records are exempt from mandatory disclosure, it is the obligation of the public body to segregate the exempt and non-exempt material and make the non-exempt material available for inspection and copying, which defendant has failed and refused to do.

10. Plaintiffs are informed and believe that the exemptions from mandatory disclosure claimed by defendant are inapplicable to plaintiffs' requests.

11. Plaintiffs are informed and believe that they are entitled to an order of the court declaring that autopsy reports are not medical records exempt from disclosure, and that "an investigative report" is not an exemption from disclosure contained in the law.

12. Plaintiffs are informed and believe that the failure and refusal of defendant to provide access for inspection and copying of the requested records is a violation of the FOIA.

13. Plaintiffs are informed and believe that the General Assembly has determined that a violation of the FOIA is an irreparable injury for which no adequate remedy at law exists.

14. Plaintiffs are informed and believe that they are entitled to an order enjoining and restraining defendant from continuing to refuse access to the requested public records and from continuing to assert exemptions from mandatory disclosure under the FOIA that have no basis in fact or law.

15. Plaintiffs are informed and believe that should they prevail in whole or in part, they should be awarded attorney fees and costs.

WHEREFORE, plaintiffs pray that this court declare that autopsy records are not medical records, that investigative reports are not per se exempt from disclosure, that defendant's failure and refusal to provide access to even the non-exempt portions of the requested records constitutes a violation of the FOIA; that defendant be enjoined and restrained from continuing to deny access for inspection and copying of records not exempt from mandatory disclosure under the FOIA and from continuing to assert exemptions to mandatory disclosure that have no basis in fact or law; issue an order enjoining and restraining defendant from continuing to refuse access to inspect and copy the requested public record and asserting exemptions that have no basis in fact or law; and, such other relief as may be appropriate to include the award of attorney fees and costs should plaintiffs prevail.

(SIGNATURE ON FOLLOWING PAGE)



Jay Bender  
BAKER, RAVENEL & BENDER, L.L.P.  
Post Office Box 8057  
3710 Landmark Dr.  
Columbia, South Carolina 29202  
803.799.9091 (telephone)  
803.779.3423 (facsimile)  
Attorneys for Plaintiffs

May 23, 2011

#4

Dec. 16, 2010

Mr. Harvin Bullock

Sumter County Coroner, 141 N. Main St.

Sumter, S.C. 29150

Dear Mr. Bullock,

Pursuant to the S.C. Freedom of Information Act, The Item requests to review all documentation relating to Aaron Leon Jacobs, 25, who died Sept. 28, 2010, including, but not limited to:

- The full and complete unredacted autopsy report of Jacobs
- All post mortem examination notes, whether orally recorded, written, or in raw, unedited format
- Any information regarding the transportation of Jacobs to and from Newberry Autopsy Associates
- Any information produced by Newberry Autopsy Associates as a result of the examination of Jacobs

According to the S.C. Freedom of Information Act, this material must be provided if it is available. You have fifteen (15) working days to respond to this request.

Of historical note: On Aug. 16, 1989, The Item sued Sumter County Coroner Bill Gamble to get the autopsy report of Joyce Robinson. This followed Gamble's denial of a FOIA request for the report. On Aug. 31, 1989, 3<sup>rd</sup> Circuit Court Judge David McInnis ordered Gamble to release the report to The Item.

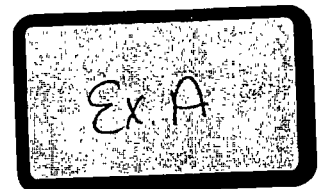
Sincerely,

Joe Perry

Senior Staff Writer, The Item

20 N. Magnolia St., Sumter, S.C.

29151





JOHNATHAN W. BRYAN  
COUNTY ATTORNEY  
Telephone: (803)774-3877  
Fax: (803)436-2108

**Sumter County**  
**Sumter, South Carolina**  
January 7, 2011

ADMINISTRATION BUILDING  
13 East Canal Street  
Sumter, South Carolina 29150-4925

Mr. Joe Perry  
Item Staff Writer  
P.O. Box 1677  
Sumter, SC 29151-1677

RE: Freedom of Information Act Request

Dear Mr. Perry:

Your letter of December 16, 2010 to Harvin Bullock, Sumter County Coroner and has been referred to me for a response.

In your letter you requested an opportunity to review all documentation relating to Aaron Leon Jacobs, 25, who died September 28, 2010, including, but not limited to:

1. The full and complete un-redacted autopsy report of Jacobs;
2. All post-mortem examination notes, but there orally recorded, written, or in raw, unedited format;
3. Any information regarding the transportation of Jacobs to and from Newberry Autopsy Associates; and
4. Any information produced by Newberry Autopsy Associates as a result of the examination of Jacobs.

It has been determined that the autopsy report will not be made available for your review. Autopsy reports are considered medical records and, as such, are not public records by definition under the South Carolina Freedom of Information Act, South Carolina Code § 30-4-20 (c). Furthermore, the report in this case is exempt as an investigative report, the release of which would be premature at this time. I understand that the South Carolina State Law Enforcement Division (SLED) has not yet released its findings concerning the shooting which presumably caused Mr. Jacobs' death. Consequently, this matter is considered still under investigation and the autopsy report would be exempt from disclosure under South Carolina Code § 30-4-40(a)(3) even if it were a public record. Mr. Bullock and I do not understand how parts 2 and 4 of your request differ from the part 1, the request for the autopsy. Nevertheless, Mr. Bullock does not have any records of the post-mortem examination of Mr. Jacobs other than the autopsy report.

You referenced in your letter a lawsuit brought by The Item against Coroner Bill Gamble in 1989. I am not familiar with that case. I asked the Clerk of Court to find the file so that I could



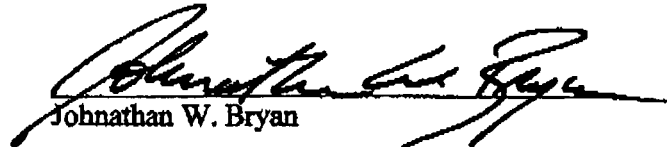
review it. The Clerk of Court's staff was not able to find any record of that lawsuit in the Sumter County Clerk of Court's records. If you have more information concerning that lawsuit, such as a case number, that would be helpful to me.

In the meantime I'm am enclosing for your review a case that arose out of Charleston County, the *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E. 2d 313 (1984). The trial Court in that case determined that the medical examiner's records were exempt from disclosure as medical records under § 30-4-20(c) and as investigative reports under § 30-4-40(a)(3). That issue was not appealed.

Concerning the transportation of Mr. Jacobs' corpse to Newberry, Mr. Bullock does not have any records concerning that. There should be an invoice and a record of payment for the transportation but those records would now be with the Sumter County Administration Finance Department. If you would like to review those records, please let me know.

You did not request a copy of the death certificate. Nevertheless, in the event you are interested in the death certificate, my understanding is that death certificates may be released only by the South Carolina Department of Health and Environmental Control. A copy of South Carolina Code § 44-63-161, "Unlawful acts; penalties," is provided for your review.

Yours truly,



Johnathan W. Bryan

Enclosures

Cc: The Honorable Harvin Bullock  
Mr. William T. Noonan

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SUMTER )

IN THE COURT OF COMMON PLEAS

Joe Perry and Osteen Publishing Co., Inc., )  
 )  
Plaintiffs, )

Civil Action No. 2011-CP-43-0979

v. )

Harvin Bullock, in his capacity as )  
Sumter County Coroner, )  
 )  
Defendant. )  
\_\_\_\_\_ )

AMENDED ANSWER

The Defendant Harvin Bullock, in his official capacity as Sumter County Coroner, answers the Plaintiffs' Complaint herein as follows:

**FOR A FIRST DEFENSE**

1. The Defendant denies each and every allegation of the Plaintiffs' Complaint not hereinafter specifically admitted, qualified, or explained.
2. The allegations set forth in Paragraphs 1 and 2 of the Plaintiff's Complaint are, upon informant and belief, admitted.
3. As to the allegations set forth in Paragraph 3 of the Plaintiff's Complaint, the Defendant admits that he is the duly elected Coroner for Sumter County and in his official capacity is subject to the South Carolina Freedom of Information Act.
4. As to the allegations set forth in Paragraph 4 of the Plaintiff's Complaint, the Defendant admits that the Plaintiff Joe Perry in his capacity as an employee of "The Item" sent a letter to the Defendant dated December 16, 2010, which is a Freedom of Information Act request for

records related to the autopsy of Aaron Leon Jacobs. The Defendant craves reference to the December 16, 2010 letter, as attached to the Complaint, as the best evidence of the request.

5. As to the allegations set forth in Paragraphs 5 and 6 of the Plaintiff's Complaint, the Defendant admits that the Sumter County Attorney on his behalf responded to the Freedom of Information Act request by letter dated January 7, 2011, a copy of which is attached as Exhibit B to the Complaint. The Defendant craves reference to that letter as the best evidence of its contents.

6. The allegations set forth in Paragraph 7 of the Plaintiff's Complaint are denied.

7. The allegations set forth in Paragraph 8 of the Plaintiff's Complaint are denied.

8. As to the allegations set forth in Paragraph 9 of the Plaintiff's Complaint, the Defendant craves reference to S.C. Code Ann. § 30-4-40(b) but denies that that statute has any application to the Plaintiffs' Freedom of Information Act request at issue. The Defendant denies any allegation that he has not complied with the requirements of S.C. Code Ann. § 30-4-40(b).

9. The allegations set forth in Paragraph 10 of the Plaintiff's Complaint are denied.

10. The allegations set forth in Paragraph 11 of the Plaintiff's Complaint are denied.

11. The allegations set forth in Paragraph 12 of the Plaintiff's Complaint are denied.

12. As to the allegations set forth in Paragraph 13 of the Plaintiff's Complaint, the Defendant craves reference to S.C. Code Ann. § 30-4-100(a).

13. The allegations set forth in Paragraph 14 of the Plaintiff's Complaint are denied.

14. The allegations set forth in Paragraph 15 of the Plaintiff's Complaint are denied.

15. The allegations and relief as set forth in the prayer for relief are denied.

**FOR A SECOND DEFENSE**

16. The records related to the autopsy of Aaron Leon Jacobs as sought by the Plaintiffs under the South Carolina Freedom of Information Act are exempt from disclosure as medical

records under S.C. Code Ann. § 30-4-20(c) and as investigative reports under S.C. Code Ann. § 30-4-40(a)(3).

**FOR A THIRD DEFENSE**

17. The records related to the autopsy of Aaron Leon Jacobs as sought by the Plaintiffs under the South Carolina Freedom of Information Act are exempt, in part, from disclosure under S.C. Code Ann. § 17-5-535.

**FOR A FOURTH DEFENSE**

18. The disclosure of records related to the autopsy of Aaron Leon Jacobs are subject to the Health Insurance Portability and Accountability Act (HIPAA). To the extent the South Carolina Freedom of Information Act or any other state law requires a coroner to disclose autopsy records without compliance with the authorization and consent provisions of HIPAA, those state laws are subject to federal preemption in accordance with Code of Federal Regulations § 160.203.

**FOR A FIFTH DEFENSE**

19. The disclosure of records related to the autopsy of Aaron Leon Jacobs are subject to the requirements of S.C. Code Ann. § 17-5-535, with which the Plaintiffs have not complied.

**FOR A SIXTH DEFENSE**

20. Upon information and belief, the Plaintiffs have received the records related to the autopsy of Aaron Leon Jacobs, which are the subject of the South Carolina Freedom of Information Act request to the Defendant. The Plaintiffs' claim is thereby moot.

**FOR A SEVENTH DEFENSE**

21. The Court lacks subject matter jurisdiction over this action. The Defendant reserves his right to file a motion pursuant to Rule 12(b)(1), SCRPC.

WHEREFORE, having fully answered the Plaintiffs' Complaint, the Defendant Harvin Bullock, in his official capacity as Sumter County Coroner, prays that the Complaint be dismissed with prejudice; for the costs of this action; and for such other and further relief as the Court deems just and proper.

DAVIDSON & LINDEMANN, P.A.

BY: 

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Post Office Box 8568  
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(803) 806-8222

*Counsel for Defendant Harvin Bullock*

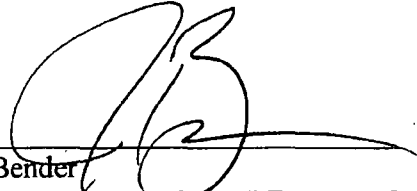
Columbia, South Carolina

July 15, 2011

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	
Joe Perry and Osteen Publishing	)	Case No. 2011-CP-43-0979
Co., Inc.,	)	
	)	
Plaintiffs,	)	
	)	NOTICE AND MOTION FOR
v.	)	SUMMARY JUDGMENT
	)	
Harvin Bullock, in his capacity as	)	
Sumter County Coroner,	)	
	)	
Defendant.	)	
	)	

TO: ANDREW F. LINDEMANN, ESQUIRE, DAVIDSON AND LINDEMANN, PA, ATTORNEYS FOR DEFENDANT:

PLEASE TAKE NOTICE that ten (10) days hereafter, or as soon thereafter as counsel may be heard, plaintiffs will move through the undersigned pursuant to Rule 56, SCRPC, for judgment in their favor on grounds that the pleadings, depositions and other matters of record show that there is no genuine issue as to any material fact and that the plaintiffs are entitled to judgment as a matter of law. Plaintiffs request the court to direct the defendant to provide a copy of the autopsy report of Arron Jacobs for *in camera* review. Plaintiffs' request for an opportunity to examine the autopsy report identified above was denied by defendant on grounds that the report "is exempt as an investigative report," and "autopsy reports are considered medical records." Exemptions from the mandatory disclosure requirements of the South Carolina Freedom of Information Act are to be narrowly construed, and the party asserting the exemption bears the responsibility of establishing the applicability of the exemption. Specifically, there is no exemption for "investigative reports," and an autopsy report is not a "medical" record.



Jay Bender  
BAKER, RAVENEL & BENDER, L.L.P.  
3710 Landmark Drive, Suite 400  
P.O. Box 8057  
Columbia, South Carolina 29202  
(803) 799-9091  
Attorneys for Plaintiff

January 3, 2012

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SUMTER )

IN THE COURT OF COMMON PLEAS

Joe Perry and Osteen Publishing Co., Inc., )  
 )  
Plaintiffs, )

Civil Action No. 2011-CP-43-0979

v. )

Harvin Bullock, in his capacity as )  
Sumter County Coroner, )  
 )  
Defendant. )  
\_\_\_\_\_ )

NOTICE OF MOTION AND  
MOTION TO DISMISS AND/OR  
MOTION FOR SUMMARY JUDGMENT

TO: JAY BENDER, ESQUIRE, COUNSEL FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant Harvin Bullock will move before the Presiding Judge of the Third Judicial Circuit at the Sumter County Courthouse, Sumter, South Carolina, at such time and place as may be set by the Court, for an Order, pursuant to Rule 12(b)(1) and Rule 56, SCRCF, granting summary judgment to the Defendant or otherwise dismissing the Plaintiffs' Complaint for lack of subject matter jurisdiction.

The Defendant's motion is based on the following grounds:


1. The records related to the autopsy of Aaron Leon Jacobs as sought by the Plaintiffs under the South Carolina Freedom of Information Act are exempt from disclosure as medical records under S.C. Code Ann. § 30-4-20(c) and as investigative reports under S.C. Code Ann. § 30-4-40(a)(3).

2. The Plaintiffs have received the records related to the autopsy of Aaron Leon Jacobs, which are the subject of the South Carolina Freedom of Information Act request to the Defendant.

The Plaintiffs' claim is thereby moot.

The Defendant's motion is based upon the pleadings filed in this case; the article entitled "Questions Linger in 2010 Shooting Death Case" in *The Item*, dated July 10, 2011 (copy attached); the rules of court; and such other matters as may be properly presented to the Court at or before the time of the hearing.

DAVIDSON & LINDEMANN, P.A.

BY:   
\_\_\_\_\_  
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*Counsel for Defendant*

Columbia, South Carolina

February 22, 2012

## Questions linger in 2010 shooting death case

BY JOE PERRY [jperry@theitem.com](mailto:jperry@theitem.com) | Posted: Sunday, July 10, 2011 6:00 am

Fight or flight?

That seems to be an overriding question in the case of Aaron Leon Jacobs, a 25-year-old man who was shot and killed Sept. 28, 2010, by a Sumter police officer after Jacobs allegedly pulled a gun.

In the wake of the release of a file documenting the shooting death of Jacobs, questions linger.

Police encountered Jacobs shortly after 9 a.m. that day walking along Patriot Parkway near Louella Lane and have said he fit the description of a carjacking suspect. Jacobs allegedly resisted a weapons pat down by Sr. Cpl. Christopher Jason Lyons and a brief struggle ensued.

Lyons and Patrolman Mark Moses - a rookie officer on the job only three months at that point - said in official statements given two days after the shooting that Jacobs tried to run away from Lyons, who grabbed his shirt.

Jacobs' shirt came off and he once again ran away.

A handgun was spotted in the rear waistband of Jacobs' pants, according to Moses and Lyons. As Jacobs was running away, he grabbed the gun and turned toward the men, according to the officers' statements.

At that point, Lyons fired on Jacobs, noting in his statement numerous times that he feared for his life and the life of Moses.

A large file containing many reports from the State Law Enforcement Division - which investigates all officer-related shootings - was released to The Item on June 22.

Included therein is an autopsy report from Newberry Pathology Associates, which shows Jacobs was shot four times - twice in the back and twice in the back of his head.

### A MATTER OF MILLISECONDS

Sumter police Det. Angie Rabon said Lyons and Moses would not be made available to talk to The Item. She said all questions would have to go to Deputy Chief Russell Roark or Maj. Alvin Holston.

Neither Roark nor Holston witnessed the shooting, but records show Roark and City Manager Deron McCormick were on scene after the incident, which included the use of fire trucks to block off and shut down a large section of Patriot Parkway.

Roark explained that Moses and Lyons wouldn't be made available to news outlets.

"We've been advised by in-house counsel not to make them available to make statements relative to the situation surrounding the event," he said. "We've got the potential of civil litigation pending."

Jacobs' family retained a Columbia attorney following the shooting. They did not release a statement for this story, but said they would be meeting with their clients Monday.

The actions of Lyons and Moses, he said, "passed muster criminally," and both officers continue to have his personal support as well support from the Sumter Police Department.

As for an eyewitness account that Jacobs didn't have a gun or even turn toward Lyons and Moses as Jacobs was running away, Roark said he would not substitute his judgment for "what independent witnesses may have or have not seen."

"That is their recount of what they saw, based on their own words."

Roark said it was important to ask if the officers had the right to be in the area and stop Jacobs, and they did.

"The threat from Mr. Jacobs lies in the mind of Mr. Jacobs," he said, adding that Lyons and Moses had the right to stop the man, interview him and pat him down for weapons.

The officers felt their lives were in danger and "did what they felt was appropriate at the time," he said.

Regarding autopsy results that show Jacobs was shot twice in the back and twice in the back of the head, Roark said he's bothered any time officers are involved in a situation where someone can be hurt.

"Whether it's a police officer or the people that we're sworn to protect or deal with every day," he said.

Roark maintains a threat existed with a weapon being presented to the officers.

"How Mr. Jacobs turns within a split second between the time the weapon is drawn by the officer, the individual can do many different things. We're talking a matter of milliseconds," he said.

The issue of four tests showing no gunshot residue on Lyons' hands - even though reports show he fired nine times at Jacobs - is something Roark said he would have to review.

"I'd have to go back and review the file," he said. "I don't remember that."

Between Sept. 28, 2010, and Sept. 30, 2010, when both Lyons and Moses gave their official statements, Roark said the officers provided enough information to himself and SLED agents to begin the investigation.

Roark said he didn't get any "factual information" from the officers until after they met with SLED agents.

#### 'I DIDN'T SEE NO GUN'

An eyewitness to the shooting, Kendrick Alexander Miller, told The Item he never saw a gun in Jacobs' hands or in his waistband.

Miller, 33, knows two of Jacobs' brothers and was familiar with Jacobs, whose nickname was "Nine."

Jacobs, Miller said, was running away from the officers, and never turned toward either one - with a gun or without a gun.

On Sept. 28, 2010, Miller and his 5-year-old son Karon were driving up Patriot Parkway toward Shaw Air Force Base. Miller said he was four cars behind the Sumter Police patrol car, which wasn't all the way off the right side of the road.

Traffic was stopped.

As Moses and Lyons were talking to Jacobs, traffic started to slowly move forward.

"So I was right up on 'em then," Miller said.

Although his car radio was on, Miller said he heard Jacobs tell the officers: "I don't got none, what do y'all want with me?"

Jacobs started to run away, and Miller said he heard an officer say 'Halt,' and grab Jacobs' shirt. Jacobs tried to push the officers' hands off his shirt, but was unsuccessful, so he grabbed the neck of his shirt with both hands and ducked out of it.

"I had to hit the brakes," Miller said, because Jacobs "spun out" of his shirt right in front of him.

Jacobs was in full sprint, running across Patriot Parkway and away from the officers.

"And my son said, 'Daddy, they're shooting,' and I looked back and he fell stiff," Miller said, "like he got Tased."

Miller said Jacobs just suddenly lurched forward, like he'd lost all control of his body. Miller told his son that Jacobs was hit by a Taser. When he got home, he was surprised to hear Jacobs had been shot.

Miller never saw a gun, he said.

"I didn't see no gun, he ain't pulled no gun," he said. "Man, he got out of that shirt and took off running."

Lyons' statement shows that he wrestled with Jacobs, who ducked out of his shirt and started to run. When he allegedly spotted a handgun tucked into his rear waistband, he said he began to fear for his life and his trainee's life.

"I ordered the subject to stop and get on the ground. The subject then reached back and retrieved the handgun as he was running away from me. My fear for my life and my trainee's life increased drastically when the subject retrieved the handgun. I ordered the subject to drop the handgun and to get on the ground. This is when the subject pointed the handgun towards me and that is when I fired my weapon at the subject," Lyons said in his statement.

All Miller heard was 'halt,' he said, while acknowledging his music was turned up.

Miller said he never saw the far right side of Jacobs' waistband, but both Lyons and Moses' statements say a gun was in the rear of Jacobs' waistband.

Jacobs definitely had nothing in his hands, as he used both hands to get out of his shirt, Miller said.

"He was running," with his back turned to the officers, he said.

"I saw he didn't get away. He just went down, stiff," Miller recalled.

When discussing what he saw on Sept. 28, 2010, Miller speculated as to the mindset that would have Jacobs pull a gun on two police officers when he was running at full speed and nearly in the woods.

"The only thing he had to do was get five more yards and he was in the trees. Five more yards and he's in the trees. He ain't gonna turn back and pull no gun on the cops. He thought the same thing I thought: I'm gone," Miller said. "What's the point of turning around and pointing a gun then?"

## GUIDELINES

According to Sumter Police Department guidelines, the use of deadly force is justified only to defend oneself or a third person from what is reasonably believed to be "an imminent threat of death or serious bodily harm," or "to prevent the escape from custody of a fleeing felon whom the officer has probable cause to believe will pose a significant threat to human life should escape occur."

Procedures for the use of deadly force show an officer is authorized to use force, either lethal or non-lethal, only after other reasonable efforts to control a situation or achieve other lawful objectives have been exhausted.

"The use of deadly force against a 'fleeing felon' who does not pose a threat is prohibited," according to department guidelines. "Deadly force against a fleeing felon is justifiable only when probable cause sufficient to justify deadly force exists."

## 'A DIFFERENT ENVIRONMENT'

Third Circuit Solicitor Ernest A. "Chip" Finney III issued a May 28 press release stating no criminal charges would be filed against Lyons.

Finney said Jacobs was running away from police, "failing to cooperate with their demands with producing an ID or talking to them."

As for Jacobs being shot twice in the back and twice in the back of the head, Finney said it's entirely possible Jacobs' back was turned to the officers, but that once officers thought a gun was being pulled out of his waistband, "It created a different environment for the officers and they responded to that environment."

"From where we saw the photographs and the diagram or whatever we looked at, the photographs showed clearly that his back would've still been to the officer when he was pulling the gun out," he said. "We're willing to give Mr. Jacobs the benefit of a doubt. We think he was probably throwing that gun into a bush or something, to get it away from him, so he wouldn't be arrested for it."

Finney said it's possible Jacobs was pulling the alleged gun to toss it.

"I think that's a possibility. That's just as reasonable as he was going to take it out to use it... I did not make my findings based on that fact. I made my findings based on the fact that the gun was pulled out of the waistband of the pants.

Whatever he intended to do with it - which is what my statement says - it alerted the officers to react in a different way than they had reacted before that time."

A SLED report shows three bullets removed from Jacobs' body didn't conclusively show they came from Lyons' .40 caliber Glock. Finney said the bullets may have been damaged.

"I can't tell you that because I'm not a ballistics person. My understanding was, that the bullets might have been damaged to the point that they could not be confirmed to have come from Lyons' firearm. But it didn't say that they didn't come from it," he said.

The Heckler & Koch 9mm handgun that authorities link to Jacobs, according to documents, was found 39 feet from his body.

Jacobs was possibly throwing it away, Finney said.

"The other possibility is that he was in flight and the gun was released for whatever reason."

Finney noted one of the SLED reports shows the 9mm gun was damaged by a bullet, which destroyed the magazine locking mechanism. The force of the bullet's impact may have knocked it away, he said.

"That would account to me why the gun was so far away from the body," he said.

Another SLED report shows the 9 mm gun was purchased June 6, 1994, from Tony's Gun & Police Supplies by Jason Brantley Smith, a Hickory, N.C., native.

Finney said his office didn't track down Smith.

"My understanding was that the gun was stolen from Mr. Smith's residence, apartment, whatever, and that's how it got into the community," he said.

Efforts to reach Smith were unsuccessful.

Finney said he didn't know why Lyons and Moses gave their statements two days after the shooting. He also said he didn't know why Moses, who said he didn't fire his gun, wasn't tested for gunshot residue.

## UNANSWERED QUESTIONS

The Item sent several questions, via email, to SLED. They included:

- Why was Mark Moses not tested for gunshot residue?
- Why did the two officers involved not give statements until two days after the shooting?
- Is it standard protocol for SLED to wait two days before taking a statement?
- Why was a Sumter police officer Angie Rabon listed as being an "on scene investigator" even though SLED is in charge of the investigation?

Kathryn Richardson, SLED's coordinator of Intergovernmental Affairs, and Susan Porter, SLED's general counsel, responded.

Porter said she was unable to field the questions as the case remains under review by the U.S. Attorney's Office.

A representative from the U.S. Attorney's Office said there would be no comment.

Detective Angie Rabon said she had "no idea" why she was listed as on scene investigator at the scene of the shooting in a SLED report. Rabon said she investigated the carjacking on Sept. 28, 2010, which

occurred on Clematis Trail early that day, about 6:55 a.m., but she wasn't investigating the shooting.

A SLED report, however, shows Rabon and another officer were listed as on-scene investigators at Patriot Parkway and Louella Lane at 10:30 a.m. that day.

As for the carjacking, Jacobs has been cleared by Finney's office for any involvement in that incident. The Sumter Police Department arrested a Richland County teenager in December 2010 and charged him in connection with the carjacking.

Reach Joe Perry at (803) 774-1272.

FA10-641

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SUMTER )

IN THE COURT OF COMMON PLEAS

Joe Perry and Osteen Publishing Co., Inc., )  
 )  
Plaintiffs, )

Civil Action No. 2011-CP-43-0979

v. )

AFFIDAVIT OF JANICE E. ROSS, M.D.

Harvin Bullock, in his capacity as )  
Sumter County Coroner, )  
 )  
Defendant. )  
\_\_\_\_\_ )

PERSONALLY APPEARED BEFORE ME, JANICE E. ROSS, M.D., who first being duly sworn deposes and states as follows:

1. I obtained a B.S. in Biology from the University of South Carolina in 1968, and received my Medical Degree in 1972 from the SUNY Upstate Medical Center in Syracuse, New York.
2. I spent two years as a Resident for Clinical Pathology at the SUNY Upstate Medical Center, and from July 1975 to June 1976, I was Chief Resident, Clinical Pathology. I was Board Certified in Anatomic and Clinical Pathology in 1976, and I received my certification in Forensic Pathology in 1985.
3. I am employed by Newberry Pathology Associates, P.A. as the Senior Forensic Pathologist. I have been employed by Newberry Pathology Associates, P.A. since May 2000.
4. Newberry Pathology Associates, P.A. was retained by Sumter County Coroner Harvin Bullock to perform the autopsy of Arron Jacobs which is at issue in this litigation.
5. I performed the autopsy of Arron Jacobs on September 29, 2010.

6. An autopsy report, such as the one prepared for Arron Jacobs' autopsy, is prepared by a medical doctor. An autopsy report includes highly personal medical information and medical history of the deceased as well as information on the cause of death.

7. In my professional medical opinion, an autopsy report, as prepared by a pathologist, as well as related documents including toxicology reports, are medical records.

8. The autopsy report for Arron Jacobs was furnished by my office to the Sumter County Coroner with the expectation that state and federal privacy laws will be complied with.

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
JANICE E. ROSS, M.D.

SWORN TO BEFORE ME THIS 29<sup>th</sup>  
DAY OF MARCH 2012

 (SEAL)  
NOTARY PUBLIC FOR S.C.

COMMISSION EXPIRES: March 20<sup>th</sup>, 2013

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SUMTER )

IN THE COURT OF COMMON PLEAS

Joe Perry and Osteen Publishing Co., Inc., )  
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Plaintiffs, )

Civil Action No. 2011-CP-43-0979

v. )

Harvin Bullock, in his capacity as )  
Sumter County Coroner, )  
 )  
Defendant. )  
\_\_\_\_\_ )

MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS AND/OR  
MOTION FOR SUMMARY JUDGMENT

**STATEMENT OF THE CASE**

This is an action seeking declaratory and injunctive relief pursuant to the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10, *et seq.* On or about December 16, 2010, the Plaintiff, Joe Perry in his capacity as an employee of "The Item," sent a letter to the Defendant Harvin Bullock, the Sumter County Coroner, making a FOIA request for records related to the autopsy of Aaron Leon Jacobs. By letter dated January 7, 2011, the Sumter County Attorney on behalf the Coroner responded to the FOIA request and declined to produce a copy of the autopsy report in his possession. The Coroner took the position that the records related to the autopsy of Aaron Leon Jacobs are not subject to disclosure because they constitute medical records under S.C. Code Ann. § 30-4-20(c) and are exempt as investigative reports under S.C. Code Ann. § 30-4-40(a)(3). The Plaintiffs thereafter filed this action on May 23, 2011.

## ARGUMENTS

**I. The Plaintiffs' Freedom of Information Act request for the autopsy report for Aaron Leon Jacobs is moot because the Plaintiffs currently have possession of the autopsy report from another source.**

Coroner Harvin Bullock has not disclosed the autopsy report for Aaron Leon Jacobs, which is the subject of the FOIA request to the Defendant. However, subsequent to the filing of this action, the Plaintiffs have received a copy of the autopsy report from the State Law Enforcement Division. In response to request for admissions, the Plaintiff has conceded that they are in currently possession of the autopsy report. *See*, Plaintiffs' Responses to Defendant's First Request for Admissions.

In the case of *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006), the South Carolina Supreme Court addressed the issue of mootness in relation to a FOIA action. The Supreme Court explained generally that "this Court only considers cases presenting a justiciable controversy" and that "[i]f there is no actual controversy, this Court will not decide moot or academic questions." 630 S.E.2d at 477. With respect to a FOIA claim, the Supreme Court held that "once the requested documents are produced, a justiciable controversy no longer exists" and thus the claim is moot. 630 S.E.2d at 477.

In the case at bar, the autopsy report has not been produced by the Coroner; yet, the Plaintiffs agree that they have received the requested autopsy report from another source, that being SLED. Under the rationale of *Sloan*, that moots this litigation. If the Plaintiffs have possession of the records sought under FOIA, there is no need to also obtain the same records from the Coroner. The ultimate goal of the litigation has been accomplished – that being the

disclosure of the autopsy report. Whether the Coroner should have produced the report in addition to SLED is a moot question.

The Supreme Court in *Sloan* also addressed the two exceptions to the mootness doctrine. However, as in *Sloan*, those two exceptions have no application. While the Coroner's duty under FOIA to produce an autopsy report is capable of repetition, there is no indication that the question is "one which will truly evade review." *Sloan*, 630 S.E.2d at 478. As the Supreme Court recognized, if another person seeks an autopsy report from the Coroner under FOIA, the courts can review the issues presented by this litigation at that time. Likewise, the second exception is not applicable. This case does not "present a question of imperative and manifest urgency requiring the establishment of a rule for future guidance in 'matters of important public interest.'" *Id.*

In sum, it is undisputed that the Plaintiffs have received the autopsy report for Aaron Leon Jacobs from another source. As a result, the issue to be litigated in this action is now moot. This Court should not decide the merits of the Plaintiffs' FOIA claim because all that remains is an academic question.

**II. The autopsy report for Aaron Leon Jacobs is not subject to disclosure under the South Carolina Freedom of Information Act.**

Coroner Harvin Bullock submits that an autopsy report is not subject to disclosure under the Freedom of Information Act because it is a medical record and is thus excluded from the definition of "public record" set forth in S.C. Code Ann. § 30-4-20(c). That Code section provides as follows:

- (c) "Public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. Records such as income tax returns, *medical records*, hospital medical staff reports, scholastic records, adoption records, records related to registration, and circulation of library materials which contain names or other personally identifying details regarding the users of public, private, school, college, technical college, university, and state institutional libraries and library systems, supported in whole or in part by public funds or expending public funds, or records which reveal the identity of the library patron checking out or requesting an item from the library or using other library services, except nonidentifying administrative and statistical reports of registration and circulation, and other records which by law are required to be closed to the public *are not considered to be made open to the public under the provisions of this act.*

S.C. Code Ann. § 30-4-20(c). (Emphasis added). The Coroner submits that an autopsy report is a medical record by the plain and ordinary meaning of the term. An autopsy report sets forth medical information on an individual including medical history and the findings of a medical doctor. An autopsy report is prepared by a medical doctor, specifically a pathologist. According to Dr. Janice C. Ross, who is the pathologist who prepared the autopsy report for Aaron Leon Jacobs, an autopsy report in her professional judgment is a medical record. *See*, Ross Affidavit.

The disclosure of an autopsy report under FOIA has not been directly addressed by our appellate courts. However, in the case of *The Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984), the lower court did rule that a medical examiner's records are exempt from disclosure under FOIA as medical records under S.C. Code Ann. § 30-4-20(c). That ruling was not appealed, and as a result, the Supreme Court did not directly address the issue. However, in its opinion, the Supreme Court also did not state or suggest any disagreement with the lower court's conclusion in that regard.

The Coroner submits that, as a matter of law, an autopsy report should be considered a "medical record" and thus not a "public record" subject to disclosure under FOIA. The Coroner takes the position that the deceased's family has certain privacy rights in such information, rights that are inherently recognized by the South Carolina General Assembly in S.C. Code Ann. §§ 44-63-60 and 44-63-84, which significantly limit access to death certificates to family members, the family's legal representatives and "[o]thers who demonstrate a direct and tangible interest ... when information is needed for the determination of a personal or property right."<sup>1</sup> There would clearly be an inconsistency in the statutory law in the event the courts were to hold that an autopsy report may be disclosed to anyone under FOIA while death certificates are severely limited as to whom may obtain them. Therefore, the intent of the General Assembly appears clear: autopsy reports are medical records and therefore are not subject to disclosure under FOIA. Instead, autopsy reports should only be disclosed with the consent of the deceased's personal representative or by court order. That position is consonant with existing statutory law.

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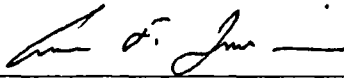
<sup>1</sup> The Coroner also believes that an autopsy report is subject to the Health Insurance Portability and Accountability Act (HIPAA). To the extent the South Carolina Freedom of Information Act or any other state law requires a coroner to disclose autopsy records without compliance with the authorization and consent provisions of HIPAA, those state laws are subject to federal preemption in accordance with Code of Federal Regulations § 160.203.

CONCLUSION

Based on the foregoing discussion, the Defendant Harvin Bullock respectfully requests that the Court grant his motion for summary judgment and dismiss the Plaintiffs' FOIA claim.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN  
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Post Office Box 8568  
Columbia, South Carolina 29202  
(803) 806-8222

*Counsel for Defendant Harvin Bullock*

Columbia, South Carolina

April 2, 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	
Joe Perry and Osteen Publishing	)	
Co., Inc.,	)	
	)	
Plaintiffs,	)	
	)	PLAINTIFFS' RESPONSES TO
v.	)	DEFENDANT'S FIRST REQUEST
	)	FOR ADMISSIONS
Harvin Bullock, in his capacity as	)	
Sumter County Coroner,	)	
	)	
Defendant.	)	

Plaintiffs respond to defendant's first request for admissions as follows:

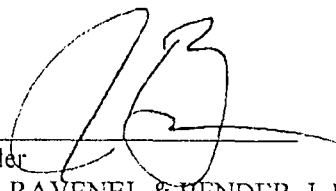
1. The Plaintiffs have received records related to the autopsy of Aaron Leon Jacobs, which are the subject of the South Carolina Freedom of Information Act request to Defendant. *Plaintiffs admit they have received a necropsy report relating to an autopsy on the body of "Arron Jacobs."* *Plaintiffs believe this report is subject to their request to defendant, but have not had an opportunity to compare this report with the one in the possession of defendant.*
2. The Plaintiffs have in their possession a copy of the autopsy report of Aaron Jacobs prepared by Newberry Pathology Associates. *Plaintiffs admit that they have a necropsy report prepared by Newberry Pathology Associates relating to an autopsy on the body of "Arron Jacobs," but have not had an opportunity to compare this report with the one in possession of defendant.*
3. The Plaintiffs have received a copy of the autopsy report of Aaron Jacobs from a source other than the Defendant. *Plaintiffs admit that they have a necropsy report*

*on an autopsy on the body of "Arron Jacobs" which was received from a source other than defendant.*

- 4. The Plaintiffs have received a copy of the autopsy report of Aaron Jacobs from the State Law Enforcement Division. *Plaintiffs admit that the necropsy report relative to an autopsy on the body of "Arron Jacobs" which they have received was provided by the State Law Enforcement Division.*
- 5. The Plaintiffs received a copy of the autopsy report of Aaron Jacobs on June 22, 2011. *Plaintiffs admit that they received a necropsy report on an autopsy on the body of "Arron Jacobs" on June 22, 2011.*
- 6. The attached copy of the article entitled "Questions Linger in 2010 Shooting Death Case" in *The Item*, dated July 10, 2011, is genuine and authentic. *Admitted.*
- 7. The factual information contained in the attached copy of the article entitled "Questions Linger in 2010 Shoot Death Case" in *The Item*, dated July 10, 2011 is true and accurate. *Plaintiffs believe they have fairly and accurately reported the contents of public records, but have not conducted an independent inquiry into the events recorded in public records.*

Columbia, South Carolina

March 29, 2010



Jay Bender  
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 803.799.9091 (telephone)  
 803.779.3423 (facsimile)  
 ATTORNEYS FOR PLAINTIFFS

STATE OF SOUTH CAROLINA )  
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3. I am employed by Newberry Pathology Associates, P.A. as the Senior Forensic Pathologist. I have been employed by Newberry Pathology Associates, P.A. since May 2000.
4. Newberry Pathology Associates, P.A. was retained by Sumter County Coroner Harvin Bullock to perform the autopsy of Aaron Jacobs which is at issue in this litigation.
5. I performed the autopsy of Aaron Jacobs on September 29, 2010.

6. An autopsy report, such as the one prepared for Arron Jacobs' autopsy, is prepared by a medical doctor. An autopsy report includes highly personal medical information and medical history of the deceased as well as information on the cause of death.

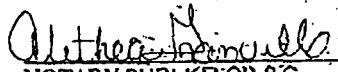
7. In my professional medical opinion, an autopsy report, as prepared by a pathologist, as well as related documents including toxicology reports, are medical records.

8. The autopsy report for Arron Jacobs was furnished by my office to the Sumter County Coroner with the expectation that state and federal privacy laws will be complied with.

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
JANICE E. ROSS, M.D.

SWORN TO BEFORE ME THIS 29th  
DAY OF MARCH 2012

 (SEAL)  
NOTARY PUBLIC FOR S.C.

COMMISSION EXPIRES: March 20th, 2013

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SUMTER )

IN THE COURT OF COMMON PLEAS

Joe Perry and Osteen Publishing Co., Inc., )  
 )  
Plaintiffs, )

Civil Action No. 2011-CP-43-0979

v. )

Harvin Bullock, in his capacity as )  
Sumter County Coroner, )  
 )  
Defendant. )  

---

**FIRST SET OF REQUESTS FOR  
ADMISSIONS TO PLAINTIFFS**

TO: JAY BENDER, ESQUIRE, COUNSEL FOR PLAINTIFFS

The Defendant Harvin Bullock, in his official capacity as Sumter County Coroner, serves upon the Plaintiffs the following requests for admissions to be answered separately and in writing by the Plaintiffs within thirty (30) days after the service hereof, pursuant to Rule 36, SCRCP.

The Defendant requests that the Plaintiffs admit or deny the following statements:

1. The Plaintiffs have received records related to the autopsy of Aaron Leon Jacobs, which are the subject of the South Carolina Freedom of Information Act request to the Defendant.
2. The Plaintiffs have in their possession a copy of the autopsy report of Aaron Jacobs prepared by Newberry Pathology Associates.
3. The Plaintiffs have received a copy of the autopsy report of Aaron Jacobs from a source other than the Defendant.
4. The Plaintiffs have received a copy of the autopsy report of Aaron Jacobs from the State Law Enforcement Division.

5. The Plaintiffs received a copy of the autopsy report of Aaron Jacobs on June 22, 2011.

6. The attached copy of the article entitled "Questions Linger in 2010 Shooting Death Case" in *The Item*, dated July 10, 2011, is genuine and authentic.

7. The factual information contained in the attached copy of the article entitled "Questions Linger in 2010 Shooting Death Case" in *The Item*, dated July 10, 2011, is true and accurate.

DAVIDSON & LINDEMANN, P.A.

BY: 

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*Counsel for Defendant Harvin Bullock*

Columbia, South Carolina

February 22, 2012

## Questions linger in 2010 shooting death case

BY JOE PERRY [jperry@theitem.com](mailto:jperry@theitem.com) | Posted: Sunday, July 10, 2011 6:00 am

### Fight or flight?

That seems to be an overriding question in the case of Aaron Leon Jacobs, a 25-year-old man who was shot and killed Sept. 28, 2010, by a Sumter police officer after Jacobs allegedly pulled a gun.

In the wake of the release of a file documenting the shooting death of Jacobs, questions linger.

Police encountered Jacobs shortly after 9 a.m. that day walking along Patriot Parkway near Louella Lane and have said he fit the description of a carjacking suspect. Jacobs allegedly resisted a weapons pat down by Sr. Cpl. Christopher Jason Lyons and a brief struggle ensued.

Lyons and Patrolman Mark Moses - a rookie officer on the job only three months at that point - said in official statements given two days after the shooting that Jacobs tried to run away from Lyons, who grabbed his shirt.

Jacobs' shirt came off and he once again ran away.

A handgun was spotted in the rear waistband of Jacobs' pants, according to Moses and Lyons. As Jacobs was running away, he grabbed the gun and turned toward the men, according to the officers' statements.

At that point, Lyons fired on Jacobs, noting in his statement numerous times that he feared for his life and the life of Moses.

A large file containing many reports from the State Law Enforcement Division - which investigates all officer-related shootings - was released to The Item on June 22.

Included therein is an autopsy report from Newberry Pathology Associates, which shows Jacobs was shot four times - twice in the back and twice in the back of his head.

### A MATTER OF MILLISECONDS

Sumter police Det. Angie Rabon said Lyons and Moses would not be made available to talk to The Item. She said all questions would have to go to Deputy Chief Russell Roark or Maj. Alvin Holston.

Neither Roark nor Holston witnessed the shooting, but records show Roark and City Manager Deron McCormick were on scene after the incident, which included the use of fire trucks to block off and shut down a large section of Patriot Parkway.

Roark explained that Moses and Lyons wouldn't be made available to news outlets.

"We've been advised by in-house counsel not to make them available to make statements relative to the situation surrounding the event," he said. "We've got the potential of civil litigation pending."

Jacobs' family retained a Columbia attorney following the shooting. They did not release a statement for this story, but said they would be meeting with their clients Monday.

The actions of Lyons and Moses, he said, "passed muster criminally," and both officers continue to have his personal support as well support from the Sumter Police Department.

As for an eyewitness account that Jacobs didn't have a gun or even turn toward Lyons and Moses as Jacobs was running away, Roark said he would not substitute his judgment for "what independent witnesses may have or have not seen."

"That is their recount of what they saw, based on their own words."

Roark said it was important to ask if the officers had the right to be in the area and stop Jacobs, and they did.

"The threat from Mr. Jacobs lies in the mind of Mr. Jacobs," he said, adding that Lyons and Moses had the right to stop the man, interview him and pat him down for weapons.

The officers felt their lives were in danger and "did what they felt was appropriate at the time," he said.

Regarding autopsy results that show Jacobs was shot twice in the back and twice in the back of the head, Roark said he's bothered any time officers are involved in a situation where someone can be hurt.

"Whether it's a police officer or the people that we're sworn to protect or deal with every day," he said.

Roark maintains a threat existed with a weapon being presented to the officers.

"How Mr. Jacobs turns within a split second between the time the weapon is drawn by the officer, the individual can do many different things. We're talking a matter of milliseconds," he said.

The issue of four tests showing no gunshot residue on Lyons' hands - even though reports show he fired nine times at Jacobs - is something Roark said he would have to review.

"I'd have to go back and review the file," he said. "I don't remember that."

Between Sept. 28, 2010, and Sept. 30, 2010, when both Lyons and Moses gave their official statements, Roark said the officers provided enough information to himself and SLED agents to begin the investigation.

Roark said he didn't get any "factual information" from the officers until after they met with SLED agents.

#### 'I DIDN'T SEE NO GUN'

An eyewitness to the shooting, Kendrick Alexander Miller, told The Item he never saw a gun in Jacobs' hands or in his waistband.

Miller, 33, knows two of Jacobs' brothers and was familiar with Jacobs, whose nickname was "Nine."

Jacobs, Miller said, was running away from the officers, and never turned toward either one - with a gun or without a gun.

On Sept. 28, 2010, Miller and his 5-year-old son Karon were driving up Patriot Parkway toward Shaw Air Force Base. Miller said he was four cars behind the Sumter Police patrol car, which wasn't all the way off the right side of the road.

Traffic was stopped.

As Moses and Lyons were talking to Jacobs, traffic started to slowly move forward.

"So I was right up on 'em then," Miller said.

Although his car radio was on, Miller said he heard Jacobs tell the officers: "I don't got none, what do y'all want with me?"

Jacobs started to run away, and Miller said he heard an officer say 'Halt,' and grab Jacobs' shirt. Jacobs tried to push the officers' hands off his shirt, but was unsuccessful, so he grabbed the neck of his shirt with both hands and ducked out of it.

"I had to hit the brakes," Miller said, because Jacobs "spun out" of his shirt right in front of him.

Jacobs was in full sprint, running across Patriot Parkway and away from the officers.

"And my son said, 'Daddy, they're shooting,' and I looked back and he fell stiff," Miller said, "like he got Tased."

Miller said Jacobs just suddenly lurched forward, like he'd lost all control of his body. Miller told his son that Jacobs was hit by a Taser. When he got home, he was surprised to hear Jacobs had been shot.

Miller never saw a gun, he said.

"I didn't see no gun, he ain't pulled no gun," he said. "Man, he got out of that shirt and took off running."

Lyons' statement shows that he wrestled with Jacobs, who ducked out of his shirt and started to run. When he allegedly spotted a handgun tucked into his rear waistband, he said he began to fear for his life and his trainee's life.

"I ordered the subject to stop and get on the ground. The subject then reached back and retrieved the handgun as he was running away from me. My fear for my life and my trainee's life increased drastically when the subject retrieved the handgun. I ordered the subject to drop the handgun and to get on the ground. This is when the subject pointed the handgun towards me and that is when I fired my weapon at the subject," Lyons said in his statement.

All Miller heard was 'halt,' he said, while acknowledging his music was turned up.

Miller said he never saw the far right side of Jacobs' waistband, but both Lyons and Moses' statements say a gun was in the rear of Jacobs' waistband.

Jacobs definitely had nothing in his hands, as he used both hands to get out of his shirt, Miller said.

"He was running," with his back turned to the officers, he said.

"I saw he didn't get away. He just went down, stiff," Miller recalled.

When discussing what he saw on Sept. 28, 2010, Miller speculated as to the mindset that would have Jacobs pull a gun on two police officers when he was running at full speed and nearly in the woods.

"The only thing he had to do was get five more yards and he was in the trees. Five more yards and he's in the trees. He ain't gonna turn back and pull no gun on the cops. He thought the same thing I thought: I'm gone," Miller said. "What's the point of turning around and pointing a gun then?"

#### GUIDELINES

According to Sumter Police Department guidelines, the use of deadly force is justified only to defend oneself or a third person from what is reasonably believed to be "an imminent threat of death or serious bodily harm," or "to prevent the escape from custody of a fleeing felon whom the officer has probable cause to believe will pose a significant threat to human life should escape occur."

Procedures for the use of deadly force show an officer is authorized to use force, either lethal or non-lethal, only after other reasonable efforts to control a situation or achieve other lawful objectives have been exhausted.

"The use of deadly force against a 'fleeing felon' who does not pose a threat is prohibited," according to department guidelines. "Deadly force against a fleeing felon is justifiable only when probable cause sufficient to justify deadly force exists."

#### 'A DIFFERENT ENVIRONMENT'

Third Circuit Solicitor Ernest A. "Chip" Finney III issued a May 28 press release stating no criminal charges would be filed against Lyons.

Finney said Jacobs was running away from police, "failing to cooperate with their demands with producing an ID or talking to them."

As for Jacobs being shot twice in the back and twice in the back of the head, Finney said it's entirely possible Jacobs' back was turned to the officers, but that once officers thought a gun was being pulled out of his waistband, "It created a different environment for the officers and they responded to that environment."

"From where we saw the photographs and the diagram or whatever we looked at, the photographs showed clearly that his back would've still been to the officer when he was pulling the gun out," he said. "We're willing to give Mr. Jacobs the benefit of a doubt. We think he was probably throwing that gun into a bush or something, to get it away from him, so he wouldn't be arrested for it."

Finney said it's possible Jacobs was pulling the alleged gun to toss it.

"I think that's a possibility. That's just as reasonable as he was going to take it out to use it... I did not make my findings based on that fact. I made my findings based on the fact that the gun was pulled out of the waistband of the pants."

Whatever he intended to do with it - which is what my statement says - it alerted the officers to react in a different way than they had reacted before that time."

A SLED report shows three bullets removed from Jacobs' body didn't conclusively show they came from Lyons' .40 caliber Glock. Finney said the bullets may have been damaged.

"I can't tell you that because I'm not a ballistics person. My understanding was, that the bullets might have been damaged to the point that they could not be confirmed to have come from Lyons' firearm. But it didn't say that they didn't come from it," he said.

The Heckler & Koch 9mm handgun that authorities link to Jacobs, according to documents, was found 39 feet from his body.

Jacobs was possibly throwing it away, Finney said.

"The other possibility is that he was in flight and the gun was released for whatever reason."

Finney noted one of the SLED reports shows the 9mm gun was damaged by a bullet, which destroyed the magazine locking mechanism. The force of the bullet's impact may have knocked it away, he said.

"That would account to me why the gun was so far away from the body," he said.

Another SLED report shows the 9 mm gun was purchased June 6, 1994, from Tony's Gun & Police Supplies by Jason Brantley Smith, a Hickory, N.C., native.

Finney said his office didn't track down Smith.

"My understanding was that the gun was stolen from Mr. Smith's residence, apartment, whatever, and that's how it got into the community," he said.

Efforts to reach Smith were unsuccessful.

Finney said he didn't know why Lyons and Moses gave their statements two days after the shooting. He also said he didn't know why Moses, who said he didn't fire his gun, wasn't tested for gunshot residue.

#### UNANSWERED QUESTIONS

The Item sent several questions, via email, to SLED. They included:

- Why was Mark Moses not tested for gunshot residue?
- Why did the two officers involved not give statements until two days after the shooting?
- Is it standard protocol for SLED to wait two days before taking a statement?
- Why was a Sumter police officer Angie Rabon listed as being an "on scene investigator" even though SLED is in charge of the investigation?

Kathryn Richardson, SLED's coordinator of Intergovernmental Affairs, and Susan Porter, SLED's general counsel, responded.

Porter said she was unable to field the questions as the case remains under review by the U.S. Attorney's Office.

A representative from the U.S. Attorney's Office said there would be no comment.

Detective Angie Rabon said she had "no idea" why she was listed as on scene investigator at the scene of the shooting in a SLED report. Rabon said she investigated the carjacking on Sept. 28, 2010, which

occurred on Clematis Trail early that day, about 6:55 a.m., but she wasn't investigating the shooting.

A SLED report, however, shows Rabon and another officer were listed as on-scene investigators at Patriot Parkway and Louella Lane at 10:30 a.m. that day.

As for the carjacking, Jacobs has been cleared by Finney's office for any involvement in that incident. The Sumter Police Department arrested a Richland County teenager in December 2010 and charged him in connection with the carjacking.

Reach Joe Perry at (803) 774-1272.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	
Joe Perry and Osteen Publishing	)	
Co., Inc.,	)	
	)	
Plaintiffs,	)	
	)	PLAINTIFFS' RESPONSES TO
v.	)	DEFENDANT'S FIRST REQUEST
	)	FOR ADMISSIONS
Harvin Bullock, in his capacity as	)	
Sumter County Coroner,	)	
	)	
Defendant.	)	
_____	)	

Plaintiffs respond to defendant's first request for admissions as follows:

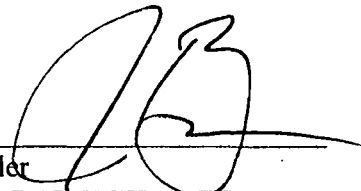
1. The Plaintiffs have received records related to the autopsy of Aaron Leon Jacobs, which are the subject of the South Carolina Freedom of Information Act request to Defendant. *Plaintiffs admit they have received a necropsy report relating to an autopsy on the body of "Arron Jacobs."* *Plaintiffs believe this report is subject to their request to defendant, but have not had an opportunity to compare this report with the one in the possession of defendant.*
2. The Plaintiffs have in their possession a copy of the autopsy report of Aaron Jacobs prepared by Newberry Pathology Associates. *Plaintiffs admit that they have a necropsy report prepared by Newberry Pathology Associates relating to an autopsy on the body of "Arron Jacobs," but have not had an opportunity to compare this report with the one in possession of defendant.*
3. The Plaintiffs have received a copy of the autopsy report of Aaron Jacobs from a source other than the Defendant. *Plaintiffs admit that they have a necropsy report*

*on an autopsy on the body of "Arron Jacobs" which was received from a source other than defendant.*

4. The Plaintiffs have received a copy of the autopsy report of Aaron Jacobs from the State Law Enforcement Division. *Plaintiffs admit that the necropsy report relative to an autopsy on the body of "Arron Jacobs" which they have received was provided by the State Law Enforcement Division.*
5. The Plaintiffs received a copy of the autopsy report of Aaron Jacobs on June 22, 2011. *Plaintiffs admit that they received a necropsy report on an autopsy on the body of "Arron Jacobs" on June 22, 2011.*
6. The attached copy of the article entitled "Questions Linger in 2010 Shooting Death Case" in *The Item*, dated July 10, 2011, is genuine and authentic. *Admitted.*
7. The factual information contained in the attached copy of the article entitled "Questions Linger in 2010 Shoot Death Case" in *The Item*, dated July 10, 2011 is true and accurate. *Plaintiffs believe they have fairly and accurately reported the contents of public records, but have not conducted an independent inquiry into the events recorded in public records.*

Columbia, South Carolina

March 29, 2010

  
\_\_\_\_\_  
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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SUMTER )

IN THE COURT OF COMMON PLEAS

Joe Perry and Osteen Publishing Co., Inc., )  
 )  
Plaintiffs, )

Civil Action No. 2011-CP-43-0979

v. )

Harvin Bullock, in his capacity as )  
Sumter County Coroner, )  
 )  
Defendant. )

**DEFENDANT'S SUPPLEMENTAL  
MEMORANDUM OF AUTHORITIES**

At the motion hearing held on April 2, 2012, the Court agreed for the parties to submit supplemental arguments and authorities with respect to the cross motions for summary judgment that the Court took under advisement. The Defendant Harvin Bullock, as Sumter County Coroner, submits the following supplemental arguments:

**I. An autopsy report is a "medical record" under S.C. Code Ann. § 30-4-20(c).**

The principal issue before this Court asks whether the autopsy report for Aaron Leon Jacobs as prepared by Janice C. Ross, M.D. qualifies as a "medical record" as that term is used in the definition of "public record" set forth in Section 30-4-20(c) of the Freedom of Information Act (FOIA). The term "medical record" is not defined by the statute and therefore must be given its plain and ordinary meaning. Existing South Carolina case law, specifically the case of *The Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984), stands for the proposition that a medical examiner's records are not subject to disclosure under FOIA as

"medical records" per S.C. Code Ann. § 30-4-20(c). While that issue was not directly before the Supreme Court because the Circuit Court's ruling on that point was not appealed, that aspect of the *Sexton* decision has never been questioned by the Supreme Court or other courts.

In addition, the conclusion that an autopsy report is a "medical record" under FOIA is also well supported by several South Carolina Attorney General's Opinions addressing the scope of FOIA which was enacted in 1978. For instance, in 1981, Attorney General Daniel R. McLeod opined as follows:

The details of an autopsy report are of such an intimate, personal nature concerning vivid medical allusions to parts of the human body, their description and indications of prior history. *A report of this nature constitutes a medical record which is not available for public consumption.*

I advise, therefore, that, in my opinion, the report is not subject to public disclosure.

1981 S.C. Op. Atty. Gen. No. 81-87, 1981 WL 96613. (Emphasis added). In 1983, Attorney General T. Travis Medlock agreed that "the detailed autopsy report would not be subject to disclosure." 1983 S.C. Op. Atty. Gen. No. 83-83, 1983 WL 142752.

The Defendant has also presented the affidavit testimony of the pathologist who prepared the autopsy report at issue. Dr. Ross offers her professional opinion that the autopsy report is a medical record which is consistent with the opinions offered by the Attorney General. *See*, Ross Affidavit, paras. 6-7. The Plaintiffs contend that Dr. Ross's opinions should be discounted because the meaning of "medical record" is an issue of law. The Plaintiffs overlook the sentence in the affidavit which says, "[a]n autopsy report includes highly personal medical information and medical history of the deceased as well as information on the cause of death." *See*, Ross Affidavit, para. 6. This is a fact that the Court should consider. Nevertheless, regardless of whether an issue of law or fact or a mixed question, the Court must determine the plain and

ordinary meaning of the term "medical record" and determine specifically whether an autopsy report is a "medical record." The Defendant submits that the opinions of both the Attorney General and Dr. Ross as well as the opinion of the court in *Sexton* are deserving of great weight in making that determination.<sup>1</sup>

**II. S.C. Code Ann. § 30-4-40(a)(18) may not be read as allowing the disclosure of an autopsy report.**

Instead of focusing on the meaning of "medical record" in Section 30-4-20(c), the Plaintiffs rely entirely on S.C. Code Ann. § 30-4-40(a)(18), which is part of the FOIA exemption section. Section 30-4-40(a)(18) currently reads as follows:

A public body may but is not required to exempt from disclosure the following information:

(18) Photographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy, except that the photographs, videos, images, or recordings may be viewed and used by the persons identified in Section 17-5-535 for the purposes contemplated or provided for in that section.

S.C. Code Ann. § 30-4-40(a)(18).

By way of legislative background, Section 30-4-40(a)(18) was initially enacted by the General Assembly in 2002 as part of the so-called "Dale Earnhardt Law" which was precipitated by the media's efforts to obtain autopsy photographs of the deceased NASCAR legend in Florida after his death in the 2001 Daytona 500. In 2002 Act. No. 350, the South Carolina General

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<sup>1</sup> The Court is also reminded that the Plaintiffs have improperly attempted to shift the burden of proof on this issue. Section 30-4-30(a) provides that "[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40." S.C. Code Ann. § 30-4-30(a). Thus, it is the Plaintiffs' burden to prove that the autopsy report that they seek under FOIA is a "public record." It is not the Defendant's burden to disprove that element of the Plaintiffs' claim.

Assembly enacted Section 30-4-40(a)(18) as well as Section 17-5-735. As originally enacted, the language of Section 30-4-40(a)(18) was identical to that of Section 17-5-735. The following year, in 2003, the General Assembly adopted the current language in Section 30-4-40(a)(18) in addition to expanding the permissible uses of autopsy photographs, videos, and audio recordings in Section 17-5-735. The title to 2003 Act No. 34 is as follows:

An Act to amend Section 17-5-535, Code of Laws of South Carolina, 1976, relating to persons authorized to view photographs or videos of and incidental to the performance of an autopsy and the penalty for violating this provision, so as to provide additional circumstances in which photographs, visual images, videos, and audio recordings of or related to an autopsy may be viewed, or disseminated and to amend Section 30-4-40, as amended, relating to matters that are exempt from disclosure under the Freedom of Information Act, *so as to revise circumstances in which photographs and videos of and related to the performance of an autopsy may be viewed, and to provide the circumstances in which certain visual images and audio recordings of an autopsy may be viewed and used.*

2003 Act No. 34. (Emphasis added).

Of significance, the General Assembly makes no mention of changing the law regarding the disclosure of written autopsy reports. It is also well settled that "there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing the legislation when later statutes are enacted concerning related subjects." *Whitner v. State of South Carolina*, 328 S.C. 1, 492 S.E.2d 777, 779 (1997). *See also, Russo v. Nationwide Mut. Ins. Co.*, 334 S.C. 455, 513 S.E.2d 127 (Ct. App. 1999). Thus, the General Assembly is presumed to have had knowledge of the *Sexton* case and the Attorney General opinions discussed above which found that an autopsy report is not subject to disclosure under FOIA because it is a "medical record."

The Plaintiffs, nonetheless, rely on the statutory rule of *expressio unius est exclusio alterius* to suggest that the General Assembly's exemption of autopsy photographs, videos, and audio recordings in Section 30-4-40(a)(18) implies that the written autopsy report is subject to disclosure. The Plaintiffs' reasoning is flawed.

In Section 30-4-40(a)(18), the General Assembly used the words "of or related to the performance of an autopsy." The General Assembly did not use the words "which are part of an autopsy report." The difference is significant because an autopsy is a procedure, and an autopsy report is a medical record that describes the findings and conclusions of the medical doctor specializing in pathology who performed the procedure.

The definition of "public record" set forth in Section 30-4-20(c) generally includes "photographs, tapes, ... recordings" and does not specifically exclude medical photographs or recordings. With the enactment of the "Dale Earnhardt Law," the General Assembly clearly intended to expand existing restrictions on access to autopsy information. The General Assembly did not need to exempt autopsy reports because – consistent with the *Sexton* case and Attorney General's opinions – it was already accepted that autopsy reports are not "public records." However, because photographs, videos, and recordings are arguably not "medical records," the General Assembly enacted Section 30-4-30(18).

In other words, Section 30-4-40(a)(18) was not added to FOIA to make parts of an autopsy report subject to disclosure. If that were the intent of the General Assembly, it would have certainly made that change in the law clear. Instead, it is obvious that Section 30-4-40(a)(18) was added because the General Assembly wanted to protect against the release of certain graphic audio and visual recordings and it did so by exempting those graphic audio and

visual recordings from release in FOIA and by criminalizing the release of those graphic audio and visual recordings except in accordance with Section 17-5-535.

The photographs, videos and recordings described in Section 30-4-40(a)(18) are those that "relate to the performance of an autopsy." They are not described as being parts of an autopsy report. As indicated, an autopsy is a procedure. An autopsy report is a record that describes the findings of the forensic pathologist who performed the procedure. By analogy, open heart surgery is a procedure. The cardiac surgeon's report is a record that describes the findings and results of the surgeon who performed the procedure. The surgeon may speak into a microphone while performing the procedure as a means of recording his observations, thoughts and intentions while performing the procedure. The surgeon may have cameras in the room and over the patient to record the specific events during the procedure. The audio and video recordings may or may not end up in the patient's file. Nevertheless, they still exist. They may be used only to assist the cardiac surgeon when he dictates and finalizes his written report and then stored separately from the written report which will be sent to patient's primary physician. Likewise, if the audio and visual recordings of the autopsy procedure do not become a part of the autopsy report, they still exist as "public records" because Section 30-4-20(c) generally includes "photographs, tapes, ... recordings"; yet they are not otherwise protected if they are not stored as part of the autopsy report which itself is not a "public record."

This was the type of record that the Dale Earnhardt Law was attempting to protect. If the audio and visual recordings that are protected by the Dale Earnhardt Law were always exclusively part of the autopsy report, there would have been no reason to mention them in a unique exemption because, as a part of the autopsy report, which is a medical record, they would not be a "public record." However, because the General Assembly took the step of describing

the graphic audio and visual recordings "of and related to the performance of an autopsy," it clearly meant to distinguish those specific video and audio recordings, knowing that they may or may not actually end up as part of an autopsy report. Therein is the reason for the distinction. Recognizing the reason for the distinction then allows for recognition of the distinction itself, which is the difference between certain graphic audio and visual recordings "of and related to the performance of an autopsy" on one hand and autopsy reports on the other hand. Those on the one hand are protected from release under the Dale Earnhardt Law. Those, on the other hand, are the findings and conclusions of a medical doctor who performed a procedure for the purpose of determining the cause of death and as such constitute a medical record which is not subject to disclosure under FOIA.

In sum, if the photographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy were necessarily a part of the autopsy report, it would not have needed separate mention in FOIA because an autopsy report is not a public record and, consequently, is not subject to disclosure under FOIA. However, given the possibility that photographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy would not necessarily be considered part of an autopsy report, the General Assembly described them in the terms "of and related to the performance of an autopsy" and exempted them from disclosure under FOIA.

Finally, the Court should place no weight on the Plaintiff's statutory construction argument based on Section 30-4-30(18) because that section is inherently inconsistent with the intent of the Dale Earnhardt Law. It is clear from 2002 Act. No. 350 and 2003 Act No. 34 that the General Assembly intended with the Dale Earnhardt Law to *prohibit* access to autopsy photographs, videos and recordings except to certain specified persons and did not intend to

permit any discretion to be exercised by the holder of those items. Section 17-5-735, which criminalizes any disclosure to non-authorized persons, makes that clear. Yet, inexplicably and inconsistent with Section 17-5-735, the General Assembly added the prohibition from Section 17-5-735 to Section 30-4-30, which by its express language says that the exemption is not a prohibition. Section 30-4-30 creates discretion in the public body by stating that "a public body may but is not required to exempt ...." S.C. Code Ann. § 30-4-40(a). That is clearly contrary to Section 17-5-735, which provides for no discretion and indeed criminalizes an unauthorized disclosure. In actuality, the prohibition on release of autopsy photographs, videos and audio recordings should have been added to the definition of "public record" as set forth in Section 30-4-20(c). In short, given the clear legislative history, the Court should not look to the "exemption" in Section 30-4-30(18) as establishing whether or not an autopsy report was intended to be subject to disclosure under FOIA.

**III. HIPAA bars the disclosure of the autopsy report without compliance with the authorization and consent provisions of HIPAA.**

At the hearing, the Defendant also cautioned that the Plaintiff's interpretation of FOIA to allow for the disclosure of an autopsy report would be contrary to the Health Insurance Portability and Accountability Act (HIPAA).<sup>2</sup> The Defendant pointed out that, to the extent the South Carolina Freedom of Information Act or any other state law requires a coroner to disclose autopsy records without compliance with the authorization and consent provisions of HIPAA, those state laws are subject to federal preemption in accordance with Code of Federal Regulations § 160.203. In contrast, the Defendant's position that an autopsy report is a "medical

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<sup>2</sup> Importantly, the Court only needs to reach the HIPAA issue if this Court agrees with the Plaintiffs that the autopsy report is not a "medical record" under Section 30-4-20(c).

record" and thus not subject to disclosure under FOIA does not give rise to any conflict between FOIA and HIPAA or any privacy laws.

In response, the Plaintiffs have generally argued that the autopsy report is not subject to HIPAA and that there is insufficient evidence to suggest that the pathologist who prepared the autopsy report is a "covered entity" under HIPAA. HIPAA regulations define "protected health information" to include "individually identifiable health information" which is held or transmitted by a "covered entity." 45 C.F.R. § 160.103. "Individually identifiable health information" is in turn defined to include information that "[r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual." *Id.* Thus, the autopsy report qualifies as "protected health information." Moreover, to the extent that the Plaintiff contends that HIPAA only applies to electronic records, that argument was rejected by the Fourth Circuit, which recognized that:

The definition of "individually identifiable health information" -- a subset of "health information" -- contains no language limiting its reach to electronic media. Thus, the plain language of HIPAA indicates that HHS could reasonably determine that the regulation of individually identifiable health information should include non-electronic forms of that information.

*South Carolina Medical Association v. Thompson*, 327 F.3d 346, 353 (4th Cir. 2003). The

Fourth Circuit further explained:

Regulating non-electronic as well as electronic forms of health information effectuates HIPAA's intent to promote the efficient and effective portability of health information and the protection of confidentiality. If coverage were limited to electronic data, there would be perverse incentives for entities covered by the rule to avoid the computerization and portability of any medical records. Such a development would utterly frustrate the purposes of HIPAA.

327 F.2d at 354. Thus, HIPAA applies to the autopsy record even if not in an electronic form.

Finally, the Defendant submits that Dr. Janice Ross – who is a practicing pathologist – qualifies as a "covered entity" under HIPAA. However, if the Court were to agree with the Plaintiffs and conclude that there is insufficient evidence to determine whether Dr. Ross is a "covered entity," that would only preclude summary judgment. In order to prove their entitlement to the autopsy report without compliance with the authorization and consent provisions of HIPAA, the Plaintiffs have the burden of establishing that HIPAA does not apply. The Plaintiffs have accordingly not sustained their burden of showing that HIPAA does not preclude the relief that they are seeking under FOIA.

### CONCLUSION

Based on the foregoing discussion, the Defendant Harvin Bullock respectfully requests that the Court grant his motion for summary judgment and dismiss the Plaintiffs' FOIA claim.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

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Columbia, South Carolina

April 12, 2012

2002 South Carolina Laws Act 350 (H.B. 3668)

SOUTH CAROLINA 2002 SESSION LAWS  
REGULAR SESSION  
1768

Additions and deletions are not identified in this document.  
Vetoed provisions within tabular material are not displayed.

Act 350  
H.B. No. 3668  
PUBLIC RECORDS

**AN ACT TO AMEND SECTION 30-4-40, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO MATTERS EXEMPT FROM DISCLOSURE FOR PURPOSES OF THE FREEDOM OF INFORMATION ACT, SO AS TO EXEMPT PHOTOGRAPHS OR VIDEOS OF AND INCIDENTAL TO THE PERFORMANCE OF AN AUTOPSY, AND BY ADDING SECTION 17-5-535 SO AS TO PROVIDE THAT PHOTOGRAPHS OR VIDEOS OF AND INCIDENTAL TO THE PERFORMANCE OF AN AUTOPSY MAY ONLY BE VIEWED BY CERTAIN PERSONS AND PROVIDE A PENALTY FOR VIOLATION.**

Be it enacted by the General Assembly of the State of South Carolina:

**Photographs or videos of autopsy exempt from FOI**

SECTION 1. Section 30-4-40(a) of the 1976 Code, as last amended by Act 122 of 1999, is further amended by adding an appropriately numbered item at the end to read:

<< SC ST § 30-4-40 >>

(18) Photographs or videos of and incidental to the performance of an autopsy, except that the photographs or videos may be viewed by:

- (i) a law enforcement agency, for official use only;
- (ii) parents of the deceased, surviving spouse, guardian, personal representative, or next of kin;
- (iii) a prosecutor or a defendant when the defendant in the case is accused of the murder or homicide of the subject of the photograph or video;
- (iv) a person bringing or defending a civil action or administrative matter where the photo or video is considered by the judge or hearing officer, by written order, to be relevant to the action or matter; or
- (v) a person who receives such photograph or video pursuant to a validly issued subpoena, after notice and opportunity to object are provided to the personal representative of the decedent's estate.

**Photographs or videos only viewed by certain persons**

SECTION 2. The 1976 Code is amended by adding:

<< SC ST § 17-5-535 >>

Section 17-5-535. (A) Photographs or videos of and incidental to the performance of an autopsy shall only be

viewed by:

- (1) the coroner and/or the medical examiner, and their deputies;
- (2) a law enforcement agency, for official use only;
- (3) parents of the deceased, surviving spouse, guardian, personal representative, or next of kin;
- (4) a prosecutor or a defendant when the defendant in the case is accused of the murder or homicide of the subject of the photograph or video;
- (5) a person bringing or defending a civil action or administrative matter where the photo or video is considered by the judge or hearing officer, by written order, to be relevant to the action or matter; and
- (6) a person who receives such photograph or video pursuant to a validly issued subpoena, after notice and opportunity to object are provided to the personal representative of the decedent's estate.

These photographs and videos must be released and disseminated only as authorized by this section.

(B) A person who violates this section is guilty of a misdemeanor and, upon conviction, must be fined not less than five thousand dollars nor more than fifty thousand dollars. Each violation under this section must be considered a separate offense.

**Time effective**

SECTION 3. This act takes effect upon approval by the Governor.

Ratified the 6th day of June, 2002.

Approved the 19th day of July, 2002.

SC LEGIS 350 (2002)

SC LEGIS 350 (2002)

END OF DOCUMENT

2003 South Carolina Laws Act 34 (H.B. 3722)

SOUTH CAROLINA 2003 SESSION LAWS  
REGULAR SESSION  
1763

Additions and deletions are not identified in this document.  
Vetoed provisions within tabular material are not displayed.

Act 34  
H.B. No. 3722  
CRIMINAL PROCEDURE

**AN ACT TO AMEND SECTION 17-5-535, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO PERSONS AUTHORIZED TO VIEW PHOTOGRAPHS OR VIDEOS OF AND INCIDENTAL TO THE PERFORMANCE OF AN AUTOPSY AND THE PENALTY FOR VIOLATING THIS PROVISION, SO AS TO PROVIDE ADDITIONAL CIRCUMSTANCES IN WHICH PHOTOGRAPHS, VISUAL IMAGES, VIDEOS, AND AUDIO RECORDINGS OF OR RELATED TO AN AUTOPSY MAY BE VIEWED, OR DISSEMINATED AND TO AMEND SECTION 30-4-40, AS AMENDED, RELATING TO MATTERS THAT ARE EXEMPT FROM DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT, SO AS TO REVISE CIRCUMSTANCES IN WHICH PHOTOGRAPHS AND VIDEOS OF AND RELATED TO THE PERFORMANCE OF AN AUTOPSY MAY BE VIEWED, AND TO PROVIDE THE CIRCUMSTANCES IN WHICH CERTAIN VISUAL IMAGES AND AUDIO RECORDINGS OF AN AUTOPSY MAY BE VIEWED AND USED.**

Be it enacted by the General Assembly of the State of South Carolina:

**Photographs, visual images, and audio recordings of an autopsy**

SECTION 1. Section 17-5-535 of the 1976 Code, as added by Act 350 of 2002, is amended to read:

<< SC ST § 17-5-535 >>

Section 17-5-535. (A) Photographs, videos, or other visual images and audio recordings of or related to the performance of an autopsy shall only be viewed by or disseminated to:

- (1) the coroner or the medical examiner, or both, and their staff;
- (2) members of law enforcement agencies, for official use only;
- (3) parents of the deceased, surviving spouse, children, guardian, personal representative next of kin, and any other person given permission or authorization to view or possess the visual images by the personal representative of the deceased's estate;
- (4) those involved in a judicial or administrative proceeding related to the death of the subject of the photograph, video, other visual image or audio recordings including, but not limited to:
  - (a) parties to a civil suit arising from, related to, or relevant to the death or autopsy of the subject of the photograph, video, other visual image or audio recordings, and the attorneys for the parties and the staff of the attorneys;
  - (b) a person charged with a crime arising from, related to or relevant to the death or autopsy of the subject of the photograph, video, other visual image or audio recordings, and the person's attorney and the staff of the attorney;
  - (c) staff of the prosecutor's office considering or prosecuting criminal charges arising from, related to or relevant to

- the death or autopsy of the subject of the photograph, video, other visual image or audio recordings;
- (d) lay and expert witnesses conferred with, consulted or retained by a party or an attorney considering or involved in a legal or administrative proceeding arising from, related to or relevant to the death or autopsy of the subject of the photograph, video, other visual image or audio recordings;
  - (e) judges and administrative hearing officers, as well as their staff, involved in a judicial or administrative proceeding arising from, related to or relevant to the death or autopsy of the subject of the photograph, video, other visual image or audio recordings; and
  - (f) members of any jury, including grand juries, petit juries and coroner's juries, empanelled to hear or decide any issue arising from, related to or relevant to the death or autopsy of the subject of the photograph, video, other visual image or audio recordings;
- (5) physicians and other persons consulted by or supervising the physicians or persons who were involved in the performance of the autopsy of the subject of the photograph, video, other visual images, or audio recordings; and
- (6) a person who receives such photographs, videos, or other visual images pursuant to a validly issued court order, after notice and opportunity to object are provided to the personal representative of the deceased's estate. These photographs and videos must be released and disseminated only as authorized by this section.
- (B) Notwithstanding the provisions contained in subsection (A), a photograph, video, other visual image of an autopsy, or an audio recording of an autopsy, or a combination of each of these items, after all information immediately identifying the decedent has been redacted and after making facial recognition anonymous to the extent reasonably possible if lawfully obtained or possessed may be used for:
- (1) legitimate medical scientific teaching or training purposes;
  - (2) legitimate teaching or training of law enforcement personnel;
  - (3) teaching or training of attorneys or other individuals with a professional need to use or understand forensic science or public health;
  - (4) conferring with medical or scientific experts in the field of forensic science or public health; or
  - (5) publication in a scientific or medical or legal journal or textbook.
- (C) A person who violates this section is guilty of a misdemeanor and, upon conviction, must be fined not less than five thousand dollars nor more than fifty thousand dollars. Each violation under this section must be considered a separate offense.

**Freedom of Information Act**

SECTION 2. Section 30-4-40(a)(18) of the 1976 Code, as added by Act 350 of 2002, is amended to read:

<< SC ST § 30-4-40 >>

(18) Photographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy, except that the photographs, videos, images, or recordings may be viewed and used by the persons identified in Section 17-5-535 for the purposes contemplated or provided for in that section.

**Time effective**

SECTION 3. This act takes effect upon approval by the Governor.  
Ratified the 8th day of May, 2003.

Approved the 14th day of May, 2003.

SC LEGIS 34 (2003)

SC LEGIS 34 (2003)

END OF DOCUMENT

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SUMTER )  
 )  
 Joe Perry and Osteen Publishing )  
 Co., Inc., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 Harvin Bullock, in his capacity as )  
 Sumter County Coroner, )  
 )  
 Defendant. )  
 )

IN THE COURT OF COMMON PLEAS

**FILE COPY**

PLAINTIFFS' SUPPLEMENTAL  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 PLAINTIFFS' MOTION FOR  
 SUMMARY JUDGMENT

**BACKGROUND**

Defendant argued at the hearing on cross-motions for summary judgment that the record sought by plaintiffs was covered by the federal Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C.A. §1320d. Defendant also offered the affidavit of Janice E. Ross, M.D., a forensic pathologist, to provide expert testimony that in her “professional medical opinion, an autopsy report, as prepared by a pathologist, as well as related documents including toxicology reports, are medical records.” Plaintiffs submit the within supplemental memorandum to address both of defendant’s contentions, and support their rejection by the court.

**ARGUMENT**

Federal law regarding the confidentiality of medical records has application only to “covered entities” as is made clear by the language of the statute which imposes restrictions only on health care clearinghouses, health plans and health care providers who transmit “any health information in electronic form in connection with a transaction referred to in section 1320d-2(a)(1) of this title” 42 U.S.C.A. §1320d-1(3). Defendant

has made no showing that the pathologist performing the autopsy of Arron Jacobs was a "covered entity" under HIPAA. Obviously the pathologist is not a health plan or a health care clearinghouse. The question thus presented, is the pathologist who performed the autopsy on the body of Arron Jacobs a health care provider who has transmitted health information in electronic form? If there is no evidence of the pathologist having transmitted health information in electronic form, the pathologist is not a covered entity subject to HIPAA. There is nothing in the record but defendant's bald assertion that an autopsy report is made confidential by HIPAA; therefore, there is nothing in the record to support the contention that the pathologist is a covered entity and the autopsy report is to be kept confidential.

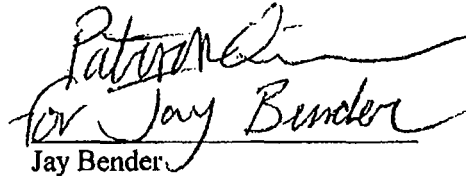
With respect to the expert testimony offered by defendant in the affidavit of Janice Ross, M.D., the affidavit is inadmissible in that it seeks to offer a conclusion as to a matter of law, *to wit*, that an autopsy report is a medical record and thus exempt from the South Carolina Freedom of Information Act. Expert testimony is admissible only to assist the court in understanding factual issues, and an expert is not competent to offer an opinion on an issue of law. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003). As the Supreme Court noted in *Dawkins*, "In general, expert testimony on issues of law is not admissible." *Id.*, 580 S.E.2d at 437. Rule 56, SCRCF requires that affidavits submitted in support of or in opposition to motions for summary judgment be made by witnesses competent to testify to the matters stated, and that the affidavits set forth such facts as would be admissible in evidence. Dr. Ross offered no facts, and her opinion on a matter of law, the meaning of "medical records" in the statute, is inadmissible for want of competency. Rule 702, SCRE; *Dawkins, supra*.

## CONCLUSION

For the reasons stated in their initial memorandum and this supplemental memorandum, plaintiffs urge the court to deny defendant's motions to dismiss and for summary judgment on grounds that defendant has failed to establish that he is as a matter of law entitled to judgment in his favor. There is no "under investigation" exemption, autopsy reports are not medical records under the Freedom of Information Act and neither defendant nor the pathologist conducting the autopsy on Arron Rogers is a "covered entity" and subject to the confidentiality requirements of HIPAA. Plaintiffs have shown that defendant has the burden of demonstrating the applicability of any claim of exemption from the mandatory disclosure requirements of the Freedom of Information Act, and his failure to do so in this case entitles plaintiffs to judgment in their favor as a matter of law.

Columbia, South Carolina

April 11, 2012

A handwritten signature in cursive script, appearing to read "Paternal" above "for Jay Bender". The signature is written in black ink and is positioned above the typed name "Jay Bender".

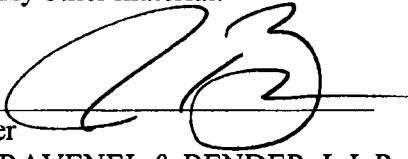
Jay Bender

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

January 23, 2013

  
\_\_\_\_\_  
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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2012-212669

RECEIVED

JAN 29 2013

SC Court of Appeals

Joe Perry and Osteen Publishing Co., Inc.....Appellants,

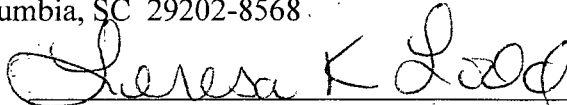
v.

Harvin Bullock, in his capacity as  
Sumter County  
Coroner.....Respondent.

CERTIFICATE OF SERVICE

I, Teresa K. Todd, Legal Assistant to Jay Bender, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with a Appellants' Final Brief and Record on Appeal by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

Andrew F. Lindemann, Esquire  
Dvidson & Lindemann, P.A.  
1611 Devonshire Drive, Second Floor  
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Teresa K. Todd

January 29, 2013